

EON BANK BHD**A****v.****LEE LEE KIM**

HIGH COURT MALAYA, KUALA LUMPUR

B

KANG HWEE GEE J

[SUIT NO: D8-22-439-2006]

12 NOVEMBER 2008

CIVIL PROCEDURE: *Summary judgment - Appeal against - Grounds - Submission of certain exhibits - Whether should be admitted - Triable issues - Whether arose - Rules of the High Court 1980, O. 14 - Evidence Act 1950, s. 90A*

C

This was an appeal by the defendant against the decision of the deputy registrar in allowing summary judgment to be entered against the defendant. The plaintiff's claim was in respect of the margin financing for the purchase of shares by the defendant from Avenue Securities. The defendant submitted (i) certain exhibits such as the documents relied on to show the transactions of the defendant should not be admitted because they were produced arbitrarily by the plaintiff with authenticity in question, thus did not comply with s. 90A of the Evidence Act 1950; (ii) exh. L9 ought not to be admitted as evidence because it was written during an attempt at settlement on or without prejudice; (iii) the transactions had not been authorized by the defendant; (iv) exh. 11 certificate of proof of debt contained errors as it referred to a different account number; (v) there was a variation in the interest rate which had not been notified to the defendant; (vi) there were inconsistencies in the amount claimed for. The plaintiff, however, contended (a) exh. L9 was a letter from the defendant to the bank and was an admission by defendant that the debt of RM753,169.03 was owed and the defendant did not see it fit to deny that the amount was owed; (b) the account number in the certificate of indebtedness was not raised in the affidavit of the defendant and further, the account number had been referred to in other correspondences between the parties; (c) bank has the right under the letter of offer to vary the interest rate and also has the right to late payment charge; (d) the amount that the defendant had been asked to pay by the plaintiff's reminder exh. L8 was RM753,169.03. There was a gap of time after this when

D**E****F****G****H****I**

A forced sale was conducted so interests, other charges and brokerage fees would have been accumulated and that was why this figure of RM753,169.03 was more than the figure of RM719,780.88.

B **Held (dismissing the appeal with no order as to costs):**

(1) There was no triable issue as to the liability of the defendant to pay the sum owed to the plaintiff. The letter exh. L9 was a clear admission of the liability. The letter was not privileged as it was not marked as such and it had led to the plaintiff accepting the offer to settle *vide* its letter exh. L9. The plaintiff was therefore entitled to exhibit this letter as evidence. Further, the certificate of indebtedness did show RM779,473.17 as at 16 March 2006 with interest of 11% calculated on the said sum from 17 March 2006 until full and final settlement. The fact that it showed a different account number from the account number of the statement in the client portfolio report should not affect the acceptance of the fact that a sum arising from the share margin account was owed. The defendant himself had not raised this discrepancy as an issue in his affidavit. With respect to quantum (the correct amount owed to the plaintiff) this ought to be properly enquired into by the court as there appeared to be some discrepancies as to the exact amount owed. There shall accordingly be an order that judgment be entered against the defendant subject to a proper assessment of the quantum by the senior assistant registrar taking into account such interests that may be imposed under the Share Margin Financing Agreement. (paras 6, 7 & 8)

Legislation referred to:

G Evidence Act 1950, ss. 2, 90A
Rules of the High Court 1980, O. 14

For the plaintiff - John Wong; M/s Azim Tunku Farid & Wong

For the defendant - S Rajita; M/s Rajan Navaratnam

H *Reported by Suhainah Wahiduddin*

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JUDGMENT**A****Kang Hwee Gee J:****This Is My Oral Judgment: (*ex-tempore*)**

[1] This is an appeal by the defendant against the decision of the deputy registrar in allowing summary judgment to be entered against the defendant. **B**

[2] The plaintiff's claim is in respect of the margin financing for the purchase of shares by the defendant from Avenue Securities. **C**

[3] Miss S. Rajita for the defendant:

i. Exhibits "L4", "L7", "L11" and "L12" cannot be admitted into evidence for non-compliance with s. 90A of the Evidence Act 1950. The documents were relied on to show the transactions of the defendant because they are produced arbitrarily by the plaintiff with the authenticity in question. **D**

ii. Exhibits "L8" and "L9" ought not to be admitted as evidence as these documents were written during an attempt at settlement on or without prejudice. **E**

iii. The transactions had not been authorised by the defendant. No affidavit by a broking firm or remisier to show that the defendant had instructed the transactions in disputes. He was not aware of the transactions. **F**

iv. Exhibit "L11" certificate of proof of debt contains error as it refers to a different account number. The certificate is based on another account not belonging to the defendant. **G**

v. There has been a variation in the interest rate which has not been notified to the defendant. The letter of offer is 1% above the BLR. Now summons in chambers' interest rate is 3.5% above the BLR. The interest rate quoted in the letter of demand is 8.89% inclusive of BLR. This is inconsistent with the 3.5% above the BLR which is being claimed under the summons in chambers. **H**

vi. Interest in the agreement itself stipulates that it should be calculated on daily rests in the letter of offer. However in the letter of demand interest is calculated on monthly rests. **I**

- A vii. There are inconsistencies in the amount claimed for after forced sale. The amount claimed is different from that stated in the affidavit in support at p. 6 and that compared to para 10 of the affidavit in support. In the Certificate of Indebtedness exh. "L11" the plaintiff claimed a higher amount
- B of RM779,473.17 whereas at p. 6 of the affidavit in support a figure of RM753,169.03 is being claimed. However, if you add the plaintiff's own figure at p. 6 the amount due is RM719,780.88.
- C viii. There are inconsistencies also at exh. "L12" which the figure quoted is RM749,206.37 whereas the plaintiff's affidavit in support at para 10 shows the amount due as at the same date as RM753,169.03. This can be seen at exh. "L8" as well.
- D [4] Mr. John Wong for the plaintiff:
- i. This is O. 14 not a trial.
- E ii. The defendant's letters were not marked "Without Prejudice". The letter that was marked "Without Prejudice" was a letter issued by the bank not the defendant or the plaintiff. Exhibit "L9" is a letter dated 18 July 2005 from the defendant to the bank. This letter is important. It is an admission by defendant that the debt of RM753,169.03 was owed by our previous
- F letter of reminder dated 7 July 2005 (exh. "L8" and this was marked "Without Prejudice" but it was our letter). The privilege is ours not the defendant.
- G iii. The defendant did not see it fit to deny that the amount was owed as per his letter exh. "L9". One can conclude therefore that the transactions mentioned in the statements were in order.
- H iv. Account number in the Certificate of Indebtedness not raised in the affidavit of the defendant. So not answered in our affidavit. The account number had been referred to in other correspondences between the parties. The defendant himself in exh. "L9" referred to the account number as his. This is an afterthought on the part of the defendant.

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- v. Variation of interest rates – bank has right under the letter of offer to vary the interest rate. The bank has also the right to late payment charge. Exhibit “L9” bank letter informing the right to levy interest of 3.5% per annum over and above the base lending rate. **A**
- vi. Admitted there is an error in the letter of demand stipulating daily monthly rests. However, in the statement of claim this has been corrected to daily rests to comply with the term of the letter of offer. **B**
- vii. The amount that the defendant has been asked to pay by the plaintiff’s reminder exh. “L8” is RM753,169.03 as at 15 July 2005. There is a gap of time after this when forced sale was conducted. So interests, other charges, brokerage fees would have been accumulated. That is why this figure of RM753,169.03 is more than the figure RM719,780.88. **C**
- viii. Same as No. 7 above. Defendant’s submission is inconsistent with what he said in his letter exh. “L9” to the bank where he requested for payment to settle at RM753,169.03. **D**
- [5] Reply By Miss S Rajita:** **E**
- i. The bank statement is inadmissible – non-compliance with s. 90A of the Evidence Act 1950. No certification by person managing the computer – applicable to affidavit evidence as well despite s. 2. No letterhead. **F**
- ii. “Without prejudice” communication applies to both sides even though one side does not label “Without Prejudice” if it is in the same correspondence on both sides. **G**
- iii. No monthly statements have been sent to the defendant nor have been exhibited in this application except an internal statement accompanying the Certificate of Indebtedness which did not give records of transactions. **H**
- iv. The defendant did use the same number but it is merely re-quoting the letter of the plaintiff. **H**
- v. Variation of interest rates – irregular as interest in letter of demand is 8.89% and interest in this claim is 11% within 1 month. There is no notification of variation. **I**
- vi. Nil.

- A vii. No explanation furnished on the inconsistent figures in the plaintiff's affidavit in support and exh. "L5".

Findings And Decision

- B [6] It is clear that there is no triable issue as to the liability of the defendant to pay the sum owed to the plaintiff. The letter exh. "L9 dated 18 July 2005" is a clear admission of the liability. The letter is not privileged as it was not marked as such and it had led to the plaintiff accepting the offer to settle *vide* its letter
- C exh. "L9 dated 16 September 2005". The plaintiff is therefore entitled to exhibit this letter as evidence. Further the Certificate of Indebtedness does show RM779,473.17 as at 16 March 2006 with interest of 11% calculated on the said sum from 17 March 2006 until full and final settlement. The fact that it shows a
- D different account number (2009-40-000781-6) from the account number of the statement in the Client Portfolio Report (520090007811) should not affect the acceptance of the fact that a sum arising from the share margin account was owed. The defendant himself had not raised this discrepancy as an issue in his affidavit. On the contrary he had also referred to the same
- E number (2009-40-000781-6) as his reference in his letter to the plaintiff offering settlement (exh. "L9 dated 18 July 2005").

- F [7] With respect to quantum (that is to say the correct amount that is owed to the plaintiff) this ought to be properly enquired into by the court as there appears to be some discrepancies as to the exact amount owed.

- G [8] There shall accordingly be an order that judgment be entered against the defendant subject to a proper assessment of the quantum by the senior assistant registrar taking into account such interests that may be imposed under the Share Margin Financing Agreement exh. "L1".

- H [9] The appeal is dismissed with no order as to costs.

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